

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-6526-99

KCPeterson

date: JAN 19 2000

to: Audie Sturla, Group Manager, Employment Tax FE:1417
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Southern California District

from: Kenneth C. Peterson, Attorney/Joyce M. Marr, Attorney
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subject: [REDACTED], TIN: [REDACTED]
Consent to extend assessment period for Forms 940 and 941
Year: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Issue

Whether the Internal Revenue Service (the Service) may use the Form SS-10, Consent to Extend the Time to Assess Employment Taxes, attached hereto as Exhibit A, to extend the statute of limitations for assessment of FICA, FUTA, and withheld income tax against [REDACTED] for [REDACTED]?

Conclusion

No, we recommend that you obtain a Form SS-10 executed by a duly authorized officer of [REDACTED] and in the space on the Form for the name of the taxpayer insert the following:

[REDACTED], EIN no. [REDACTED],
as successor in interest to [REDACTED], EIN
no. [REDACTED].

The number of subsidiaries named on the attached rider also must be inserted in the space provided on the Form SS-10 for the name of the taxpayer.

As you know, pursuant to the procedure in Rev. Proc. 72-38, 1972-2 C.B. 813, a rider to Form SS-10 may be prepared to bind subsidiaries of [REDACTED]. You should prepare a rider to accompany the Form SS-10. Pursuant to the procedure in Rev. Proc. 72-38, 1972-2 C.B. 813, each corporation which was a subsidiary of [REDACTED] during [REDACTED] may by power of attorney specifically authorize a duly authorized officer of [REDACTED] to execute the rider to the Form SS-10 on its behalf. As discussed herein, in addition to the information that you have included on the proposed rider which you forwarded with your request for advice, you should set out the address of each corporation which was a subsidiary of [REDACTED] during [REDACTED].

The Service should also note that the [REDACTED] and the individual [REDACTED] corporations will not be bound by the consent to extend the statute discussed herein.

[REDACTED]
[REDACTED].

Sometime during [REDACTED], [REDACTED] acquired, directly or indirectly, [REDACTED] % of the stock of [REDACTED] and all of the entities listed in the immediately preceding paragraph.

[REDACTED] timely filed Form 940, Employer's Annual Federal Unemployment Tax Return, for the period [REDACTED], to [REDACTED], and timely paid the related tax liability.

[REDACTED] timely filed Form 941, Employer's Quarterly Federal Tax Return, for the period [REDACTED], to [REDACTED] and timely paid the related tax liability.

The Service is uncertain which employees were covered by the [REDACTED] Forms 940 and 941 filed by [REDACTED]. The Service believes that the Forms 940 and 941 covered the employees of [REDACTED] and may have covered the employees of [REDACTED]'s subsidiaries,³ the employees of the former [REDACTED], the [REDACTED] and the individual [REDACTED] corporations listed above.

On [REDACTED], pursuant to the laws of the state of Delaware and Washington, [REDACTED] merged into [REDACTED] ("[REDACTED]"), a Washington corporation. The agreement pursuant to which the merger was effectuated stated that it was to be governed pursuant to the laws of the State of Washington.

The outstanding shares of capital stock of [REDACTED] were converted into shares of [REDACTED] common stock. More specifically, [REDACTED] issued [REDACTED] shares of common stock in exchange for all of the outstanding shares of the common stock of [REDACTED]. [REDACTED] transferred its assets and liabilities to [REDACTED]. [REDACTED] then ceased to exist while [REDACTED] survived. These corporations intended the transaction to be a tax-free reorganization under I.R.C. § 368(a)(1)(A).⁴

³ During [REDACTED] [REDACTED] owned the following subsidiaries: [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. These entities were included on the consolidated Form 1120 filed by [REDACTED] for the period [REDACTED] through [REDACTED].

⁴ The Service has not yet audited this transaction to determine whether it qualifies as non-taxable under the aforementioned Code section.

On [REDACTED], pursuant to an Agreement and Plan of Reorganization and Merger (the Merger Agreement), all outstanding shares of [REDACTED] and [REDACTED] ([REDACTED]), a Delaware corporation, were converted into capital stock of [REDACTED], a Delaware corporation.⁵ Thus, the stockholders of [REDACTED] and [REDACTED] became the stockholders of [REDACTED]. [REDACTED] and [REDACTED] became and continued to conduct their respective businesses and operations as wholly owned subsidiaries of [REDACTED]. The parties to this transaction intended the exchange to be non-taxable under I.R.C. § 351 or I.R.C. § 368.⁶

The Merger Agreement provides that it shall be governed and interpreted in accordance with the laws of the State of Delaware.

The Service is auditing [REDACTED]'s Form 1120, Form 940, and Form 941 for the short period beginning [REDACTED], and ending [REDACTED]. The Service, with the consent of [REDACTED], would like to extend the statute of limitations on assessment to [REDACTED], for the Forms 940 and 941.

The Service has forwarded to Counsel a proposed consent to extend the statute of limitations. (See the Form SS-10 attached as Exhibit A.) The Service wants to know if the proposed consent will legally bind the taxpayer; the Service is especially concerned about how to refer to the taxpayer because of the mergers described above.

In the space for the name of the taxpayer on the proposed consent form, the Service has inserted the following:

[REDACTED] EIN no. [REDACTED], as successor in interest to [REDACTED] EIN no. [REDACTED], as successor in interest to [REDACTED], EIN no. [REDACTED].

⁵ More specifically, to accomplish the business combinations by and between [REDACTED] and [REDACTED], the following subsidiary of [REDACTED] was created, [REDACTED]. In addition, [REDACTED] ("Merger Sub") and [REDACTED] ("Merger Sub"), subsidiaries of [REDACTED], were created. Thereafter, in [REDACTED], [REDACTED] changed its name to [REDACTED]. Then, on [REDACTED], [REDACTED] Merger Sub and [REDACTED] Merger Sub merged with and into [REDACTED] and [REDACTED], respectively. The stock of [REDACTED] Merger Sub was converted to [REDACTED] stock. The stock of [REDACTED] Merger Sub was converted to [REDACTED] stock. All [REDACTED] and [REDACTED] stock was then converted to [REDACTED] stock. The separate corporate existence of [REDACTED] Merger Sub and [REDACTED] Merger Sub ceased and [REDACTED] and [REDACTED] survived and continued to exist.

⁶ The Service has not yet audited this transaction to determine whether it qualifies as non-taxable under the aforementioned Code sections.

The Chief Financial Officer of [REDACTED], a minority shareholder, has already signed the consent form.⁷ The Chief Financial Officer is not a shareholder, officer, or director of any of the corporations which were subsidiaries of [REDACTED] during [REDACTED].

Discussion

Statute of Limitations on assessment

Employers which are required to pay federal unemployment taxes must file annually Form 940, Employer's Annual Federal Unemployment Tax Return. The Form 940 is due on or before January 31st of the calendar year following the period for which it is made. If, however, the full taxes due have been timely deposited, the return may be filed on or before February 10th. Treas. Reg. § 31.6071(a)-1(c).

Employers subject to Federal Insurance Contributions Act or income tax withholding, or both, are required to file quarterly a Form 941, Employer's Quarterly Federal Tax Return, with certain exceptions not material. Treas. Reg. § 31.6011(a)-4. Form 941, is due on or before the last day of the month following the quarter involved. Treas. Reg. § 31.6071(a)-1(a). However, an extension of time for filing is automatically granted to the 10th day of the second month following the close of the calendar quarter if the return is accompanied by depositary receipts showing timely deposits in full payment of taxes due for the period. Id.

The general rule under I.R.C. § 6501 is that the Service must make an assessment of tax within three years after the return is filed. A return filed early is considered filed on the due date. I.R.C. § 6501(b)(1). For FICA and income tax withholding, if the return is filed before April 15 of the subsequent year, the return is considered filed on April 15 of such calendar year. I.R.C. § 6501(b)(2).

Thus, the statutory period of limitations on assessment of FICA and income tax withholding liabilities is three years from April 15 of the following calendar year, or the date the return was filed, whichever is later. For Federal Unemployment Tax Act

⁷ The Service and the taxpayer understand that they may need to sign a revised version of this Consent. The Service asked the taxpayer to sign the proposed Consent so that the Service would know that the taxpayer is acting in good faith and will probably sign the revised version when it is ready.

taxes, the assessment period generally expires three years from the due date of the return or from the date the return was filed, whichever is later.

Here, the Form 941 for the last quarter of [REDACTED] was timely filed. Thus, the Service has until [REDACTED], to make assessments related to [REDACTED]'s [REDACTED] FICA and withholding tax liabilities.

The Form 940 was due on [REDACTED] (or [REDACTED], if the taxpayer made timely deposits). [REDACTED] timely filed its Form 940. Thus, the Service has until [REDACTED], to make an assessment related to [REDACTED]'s FUTA tax liability. If [REDACTED] made timely deposits during [REDACTED], that period is extended to [REDACTED].⁸

Pursuant to I.R.C. § 6501(c)(4), before the expirations of the statutes of limitations on assessment, the Service may extend the above deadlines with the consent of the taxpayer.

The proper corporation to sign the consent form

When state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891 (3d Cir. 1929); Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931) (distinguishing Phillips v. Lyman H. Howe Films Co., 33 F.2d 891 (3d Cir. 1929), which held that pursuant to Pennsylvania law, a surviving corporation in a merger is liable for the debts of the merged corporation).

It can be argued that after a statutory merger the surviving corporation also becomes liable as transferee for the debts of the merged corporation. See Treas. Reg. § 301.6901-1(b) (A transferee at law includes a successor of a corporation.) and Rev. Rul. 59-399, 1959-2 C.B. 488 (the Service stated that a surviving corporation in a statutory merger may execute a valid Form 872 Consent as well as a valid Form 977 Transferee Consent.) See also G.C.M. 34,970, Primary Liability and Transferee Liability of Successor Corporation, I-4092 (July 31, 1972).

However, as a general practice, in merger cases where state law imposes primary liability on the surviving corporation, the

⁸ Nevertheless, the Service would like to execute the Consent to Extend the Statute of Limitations before [REDACTED].

Service only asserts primary liability and does not attempt to assert transferee liability against the surviving corporation. This is because of the Tax Court's persistence in rejecting transferee liability in such cases. Id.; See also Missile Systems Corp. v. Commissioner, T.C. Memo. 1964-212.

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931).

The agreement pursuant to which [REDACTED] merged into [REDACTED], a Washington corporation, states that it is to be governed by the laws of the State of Washington.

State courts in Washington give effect to choice of law provisions in an agreement, so long as: (1) such laws have a substantial relationship to the parties or their transaction; and (2) application of the law of the chosen state is not contrary to a policy of a state with a materially greater interest in the determination of the given issue and which would be the state of the applicable law in the absence of an effective choice of law provision by the parties. O'Brien v. Shearson Hayden Stone, Inc., 90 Wash. 2d 680, 586 P.2d 830 (1978), supplemental op., 93 Wash. 2d 51, 605 P.2d 779 (1980).

Here, the merger agreement pertaining to the merger of [REDACTED], a Delaware corporation, into [REDACTED], a Washington corporation, specifies that the laws of the state of Washington shall control. Since the chosen state law in the agreement is the law of the state in which the surviving corporation is incorporated, the chosen state law has a substantial relationship to the transaction and the choice of law provision should be honored.

WASH. REV. CODE ANN. § 23B.11.060 provides that "When a merger takes effect ... [t]he surviving corporation has all liabilities of each corporation party to the merger"

Because Washington law so provides, [REDACTED], as the surviving corporation, is primarily liable for the employment tax liabilities of [REDACTED]. Hence, [REDACTED] should sign the Form SS-10 as successor in interest to [REDACTED].

How the Consent Form should be signed and which Form should be used

When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." G.C.M. 34,970, Primary Liability and Transferee Liability of Successor Corporation, I-4092 (July 31, 1972). The proper form for the Service to use when extending the statute of limitations for assessing taxes under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and Code provisions relating to collecting income tax at source on wages is Form SS-10. IRM 4635.

Here, because [REDACTED], is primarily liable for the taxes, the Service has correctly chosen to use Form SS-10. The Service should insert the name of the taxpayer on the Form SS-10 using the phrase "successor in interest," as suggested by G.C.M. 34,970. Consequently, it is our opinion that the Service should set forth the name of the taxpayer Form SS-10 as follows:

[REDACTED], EIN no. [REDACTED],
as successor in interest to [REDACTED], EIN
no. [REDACTED].

Information that must be included on the Rider

Rev. Proc. 72-38, 1972-2 C.B. 813, sets forth the conditions under which the Service will accept a single consent to extend the statute of limitations for a parent corporation and its subsidiaries; thus, if the requirements of the revenue procedure are satisfied, a duly authorized officer of a parent corporation may execute a consent on behalf of subsidiaries. The revenue procedure requires a rider be affixed to the consent. A rider which is intended by you to comply with the revenue procedure is affixed to the proposed Form SS-10 attached hereto as Exhibit A.

The number of subsidiary corporations named on the attached rider should be inserted in the space provided for the name of the taxpayer on the Form SS-10. Rev. Proc. 72-38, 1972-2 C.B. 813.

The rider attached to the Form SS-10 should contain a supplemental agreement, clearly identify the parent and the specific subsidiaries by showing their names, addresses, and identification numbers, and reflect the particular taxable years

or periods, as well as the applicable excise or employment taxes, of each subsidiary with respect to which the form is applicable. Id.

In the event two or more officers of the parent corporation are signing for the various subsidiaries, the rider attached to the consent should be arranged to show the names of the subsidiaries for which each officer or attorney-in-fact is signing. Id.

The proposed rider is incomplete. The Service should add the number of subsidiaries in the space provided for the name of the taxpayer on Form SS-10. In addition, the Service should include the address of each subsidiary and, in the event that two or more officers sign for the various subsidiaries, the name of the officer who is signing for such subsidiary.

Who should sign the consent

Both the consent and the rider must be executed on behalf of the parent corporation and all the subsidiaries named on the rider by a duly authorized officer of [REDACTED] who (1) is also a duly authorized officer of each of the subsidiaries, or (2) has been specifically authorized to execute a consent by powers of attorney executed by each of the subsidiaries. The consent must specifically show that the person signing for [REDACTED] and the subsidiaries is signing in the capacity of an authorized officer of [REDACTED] and as an authorized officer or attorney-in-fact for each and all of the listed subsidiaries. See Rev. Proc. 72-38, 1972-2 C.B. 813.

An officer duly authorized to sign the consent includes the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. See I.R.C. § 6062 and Rev. Rul. 83-41, 1983-1 C.B. 349. In addition, if an individual has signed the tax return, this indicates that the officer is duly authorized to sign a consent for the corporation. See I.R.C. § 6062 and Rev. Rul. 83-41, 1983-1 C.B. 349.

Here, a duly authorized officer of [REDACTED] may sign the consent and rider on behalf of each of [REDACTED]'s subsidiaries during [REDACTED], provided that each of the subsidiaries executes a power of attorney specifically authorizing the officer to sign the consent and rider on its behalf.

Record Keeping

The Service should attach a statement to the relevant employment tax return of each of the subsidiaries indicating that a consent executed on behalf of the subsidiary has been secured and associated with the return of the [REDACTED]. The statement should also show the name, address, and identification number of the [REDACTED], the office in which the applicable tax return of [REDACTED] was filed and the period of the extension agreed to in the consent. See Rev. Proc. 72-38, 1972-2 C.B. 813.

Entities not covered

[REDACTED] and the individual [REDACTED] corporations will not be covered by the consent to extend the statute of limitations discussed herein. These entities were separate from [REDACTED] in [REDACTED]. The only relationship between [REDACTED] and these corporations in [REDACTED] was through management contracts. Thus, any consent executed on behalf of [REDACTED] and its subsidiaries will only cover the employees of [REDACTED] and its subsidiaries.

Recommendation

We recommend that you obtain a Form SS-10 executed by a duly authorized officer of [REDACTED] and in the space on the Form for the name of the taxpayer insert the following:

[REDACTED], EIN no. [REDACTED],
as successor in interest to [REDACTED], EIN
no. [REDACTED].

The number of subsidiary corporations named on the attached rider also must be inserted in the space provided on the Form SS-10 for the name of the taxpayer.

As you know, pursuant to the procedure in Rev. Proc. 72-38, 1972-2 C.B. 813, a rider to Form SS-10 may be prepared to bind subsidiaries. You should prepare a rider to accompany the Form SS-10. Pursuant to the procedure in Rev. Proc. 72-38, 1972-2 C.B. 813, each corporation which was a subsidiary of [REDACTED] during [REDACTED] may by power of attorney specifically authorize a duly authorized officer of [REDACTED] to execute the rider to the Form SS-10 on its behalf. As discussed herein, in addition to the information that you have included on the proposed rider which you forwarded with your request for advice, you should set out the address of each corporation which was a subsidiary of [REDACTED] during [REDACTED].

The Service should also note that the [REDACTED] and the individual [REDACTED] corporations will not be bound by the consent to extend the statute discussed herein.

Please contact the undersigned at (949) 360-2688 if you have any questions concerning the foregoing.

Joyce M. Marr
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